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SOMALI PIRACY AND THE HUMAN RIGHTS OF SEAFARERS

SOFIA GALANI*

Abstract

Somali piracy has attracted the world's attention over the last decade and whilst Somali piracy abates, the debate on its various aspects remains lively. This paper aims to shed light on one particular aspect of Somali piracy that remains unexplored – the violations of the human rights of seafarers, and especially those taken hostages. Despite the suffering of seafarers at the hands of pirates, their protection seems to fall beyond the human rights framework due to the non-state status of pirates. The lack of a human rights-oriented approach is reflected by significant counter-piracy responses, including the UNSC Resolutions, criminal responses and the conduct of naval operations that are reviewed here. Therefore, it is suggested that the traditional negative obligations of States and the evolution of the positive human rights obligations of States can offer a legal avenue for the better protection of the human rights of seafarers.

(Keywords: hostages, seafarers, piracy, human rights)

1. INTRODUCTION

Piracy has been known since antiquity, but it drew the world's attention over the last decade when pirate attacks revived off the coasts of Somalia.¹ The high rates of Somali pirate incidents produced various responses from the international community. Co-ordinated counter-piracy efforts yielded significant results and over the last year Somalia-based attacks

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¹ The term piracy will be broadly used in this paper to encompass piracy and armed robbery. Piracy is defined in Article 101 of the 1982 UNCLOS. Armed robbery is defined by the International Maritime Organisation (IMO) in its Resolution A.1025 (26) (2009) Art2 (2.2) 'Code of Practice for the investigation of crimes of piracy and armed robbery against ships'. For the re-emergence of Somali piracy see A Palmer, *The New Pirates: Modern Global Piracy from Somalia to the South China Sea* (London: I.B. Tauris, 2014) 123-124.

dropped to their lowest level in six years, with only 9 recorded pirate attacks.² Arguably, the international community did not only commit to put an end to the ‘evils’ of piracy, but also demonstrated its commitment to achieve this goal without sacrificing human rights. Therefore, human rights law seems to have played a crucial role in how counter-piracy responses have been shaped and States seem to have acknowledged their human rights obligations towards pirates.

Nevertheless, this paper is not aimed either at assessing the effectiveness of counter-piracy efforts *per se* or their compliance with the human rights obligations of States to pirates. The aim of this paper is to examine counter-piracy responses from the perspective of the victim. More specifically, this paper aims to shed light on a piracy related problem that has not gained the attention it deserves – the violation of the human rights of seafarers, and especially those who have been taken hostages. Although there has been no successful hijacking over the last year, as of July 2015, there were still 26 seafarers in captivity for more than two years.³ The development of Somali piracy into a business model generating profits through ransom has made pirates daring and violent.⁴ Somali pirates do not hesitate to employ lethal force during their attacks or inflict severe pain on seafarers with a view to extracting their ransom. This means that seafarers, and particularly those taken hostages, suffer a significant risk of human rights violations, such as threats against their life, ill-treatment, illegal detention and breach of their privacy. Seafarers in other regions around the world affected by piracy are also confronted with the same risks. While the focus of this paper is on Somali piracy, it should be noted that the ‘kidnap and ransom’ model of piracy has been steadily employed by pirates around the world and this makes the analysis of this

² ICC International Maritime Bureau (IMB), ‘Piracy and Armed Robbery against Ships: 1 January- 30 September 2014’ at www.hellenicshippingnews.com/wp-content/uploads/2014/10/2014-Q3-IMB-Piracy-Report-ABRDGED.pdf (accessed 11 October 2015). Oceans Beyond Piracy (OBP) reported 142 incidents of pirate activity in the Western Indian Ocean Region, ‘The State of Maritime Piracy 2014’ (2015) 27 at www.oceansbeyondpiracy.org/sites/default/files/attachments/StateofMaritimePiracy2014.pdf (accessed 11 October 2015). The low numbers of pirate attacks have been challenged on the ground of inaccurate reporting. See J Huggins & L Kane-Harnett, ‘Somali Piracy – Are we at the End Game?’ (2013) OBP 2-3 at oceansbeyondpiracy.org/sites/default/files/attachments/Jon%20Cleveland%20Document%20_final.pdf (accessed 11 October 2015).

³ UNODC, ‘Maritime Crime Programme’ (2014) 28, OBP (2015), *ibid*, 29

⁴ For a full analysis of the functioning of Somali piracy as a business model, see World Bank (a), ‘Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa’ (2013) 37-75 and World Bank (b), ‘The Pirates of Somalia: Ending the Threat, Rebuilding a Nation’ (2013) 108-110.

article relevant to the protection of human rights of seafarers attacked and held hostages in other regions.⁵

While there have been some regional soft law instruments, namely the Djibouti Code of Conduct and the Declaration condemning the violence against seafarers, which pay due attention to the suffering of seafarers attacked and held hostages by pirates, their human rights protection has yet to be seriously considered. Arguably, the status of pirates as ‘non-state actors’ may mean that the protection of seafarers falls beyond the human rights framework, as States do not bear responsibility for the suffering of seafarers at the hands of pirates.⁶ However, the evolution of the positive obligations of States to prevent and put an end to human rights violations, when they know or ought to have known that individuals are at risk,⁷ offers an alternative avenue for the protection of the human rights of seafarers. This paper will first discuss the violations of the human rights of seafarers in the context of piracy. It will then assess some of the most significant counter-piracy responses, namely the United Nations Security Council (UNSC) Resolutions, the criminalisation of piracy and the naval operations, which mirror the lack of recognition of the human rights of seafarers. The lack of a human rights conscious approach will be contrasted with the evolution of the human rights framework that demonstrates how States *could* be responsible for stepping in and putting an end to the violations of the human rights of seafarers, while also respecting their traditional negative human rights obligations in the fight against piracy. It will be concluded that some regional and international efforts made to protect the victims of hostage-taking can provide a pattern for more human rights oriented initiatives that could offer enhanced protection to seafarers.

⁵ OBP, ‘The State of Maritime Piracy 2013’ (2014) 2 68 at oceansbeyondpiracy.org/sites/default/files/attachments/SoP2013-Digital.pdf (accessed 11 October 2015), OBP, ‘Human Cost of Maritime Piracy 2012’ (2013) 13 at oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf (accessed 11 October 2015)

⁶ Art2 of the International Law Commission’s (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (2001) *Yearbook of the ILC, vol II*. For an overview, see J Crawford, *State Responsibility - The General part* (Cambridge: CUP, 2013).

⁷ The international and regional human rights bodies have established that States have negative, positive and procedural human rights obligations. See also the discussion in A Clapham (ed), *Human Rights and Non-State Actors* (Cheltenham: Edward Elgar, 2013), P Alston (ed), *Non-state Actors and Human Rights* (Oxford: OUP, 2005), J Crawford, J A Pellet and S Olleson (eds), *The Law of International Responsibility* (Cambridge: CUP, 2010).

2. TRANSLATING THE HUMAN COST OF PIRACY INTO HUMAN RIGHTS VIOLATIONS

There are many areas around the world affected by piracy,⁸ but Somali piracy has at least two distinct characteristics that make it important to assess from the victim's perspective. The first is that Somali piracy has proved highly adaptive and the modus operandi of pirates has been fast evolving. This has made Somali piracy a constant threat to the welfare of seafarers. Despite the reduced pirate activity, the sustainability of the current counter-piracy measures has been questioned and fears have been expressed that Somali piracy has not come to an end yet.⁹ The second trait of Somali piracy is that it has developed into a business model that yields profits through ransoms.¹⁰ Unlike piracy in other regions, Somali piracy has a dominant objective, which is to ransom the crews and vessels.¹¹ Given that seafarers are the target of Somali pirates, the human cost of Somali piracy demands special review. Although the human cost of piracy has been discussed by officials and analysed by various research, it is worth asking what the human cost of Somali piracy means. In the context of the human cost of piracy, the deaths, injuries, ill-treatment, prolonged captivity and breaches of privacy of seafarers have been examined. Translating the suffering of seafarers into the language of legal norms means that we are not talking about anything else but the violations of the human rights of seafarers, namely their right to life, freedom from torture, freedom from illegal detention and privacy, which are being reviewed below.

⁸ See the IMB live piracy map at www.icc-ccs.org/piracy-reporting-centre/live-piracy-map (accessed 11 October 2015).

⁹ Report of the Secretary-General on Somalia (S/2014/140) 7 at 37, Huggins, above n 2, 9, Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia (S/2013/623) 16 at 70. Palmer, above n 1, challenges this approach and argues that piracy is not a function of the failure of Somalia, but a result of the failed reconstruction attempts of the West, 9-10.

¹⁰ World Bank (a), above n 4, 39-44

¹¹ For piracy off the coasts of West Africa see C Marts, 'Piracy Ransoms-Conflicting Perspectives' (2010) *One Earth Future Foundation* 9-11, NM Murphy, 'Petro-Piracy: Predation and Counter-Predation in Nigerian Waters' in D Guilfoyle (ed) *Modern Piracy*, Cheltenham: Edward Elgar, 2013) 78-84. For Southeast Asia, see D Ong, 'Alternative Approaches to Piracy and Armed Robbery in Southeast Asian Waters and off the Horn of Africa: A Comparative Perspective' in P Koutrakos & A Skordas (eds) *The Law and Practice of Piracy at Sea: European and International Perspectives* (Oxford: Hart Publishing, 2014) 269-276 and R Beckman, 'Piracy and armed robbery against ships in Southeast Asia' in Guilfoyle (2013) 24-25.

2.1. THE CURRENT NATURE OF SOMALI PIRACY: FROM ‘ROBIN HOOK’¹² TO CRIMINAL ABDUCTORS

The phenomenon of piracy has evolved over the last decade and has now been transformed into a profitable criminal business. It is estimated that an amount between US\$340 million and US\$435 million was paid in the form of ransoms for ships and/or seafarers kidnapped by Somali pirates between 2005 and 2014.¹³ Apart from the marginal opportunities to escape poverty that have encouraged Somalis to turn to the lucrative business of piracy, it should also be noted that Somalis possess the sea-going and military skills to become pirates.¹⁴ Pirates have been heavily armed and do not hesitate to fire automatic weapons and Rocket Propelled Grenades (RPGs) against vessels and their crews.¹⁵ Pirates have also proved to be highly adaptive, and the sophistication of their modus operandi is striking. Among the most notorious techniques operated by pirates remains the use of the “mother vessels”, which ranges from fishing dhows to larger vessels.¹⁶

2.2. THE ESCALATING VIOLENCE AGAINST SEAFARERS

The highly evolving nature of piracy has had an adverse impact on the welfare of seafarers. The victims of piracy have been confronted with unprecedented levels of violence. During the period 2010-2014, almost 9,688 seafarers were attacked by pirates, 2,878 seafarers came in close contact with pirates, when their vessel was boarded, and 2,060 seafarers were taken hostages.¹⁷ During a pirate attack, seafarers face serious risks of being injured or killed, as pirates employ lethal force against them. The perils posed to the welfare of seafarers are increased when a vessel has armed guards on board, as seafarers may get caught up in the crossfire.¹⁸ The psychological distress that seafarers suffer is also severe. In the case where seafarers have to hide in a citadel upon a pirate attack, they may be attacked by pirates for

¹² World Bank (b), above n 4, 87

¹³ *ibid* 30-31, OBP (2014), above n 5, 10, OBP (2015), above n 2, 20

¹⁴ Palmer, above n 1, 9, 42, 99

¹⁵ UNSC Resolution 1838(2008), Report of the Special Adviser to the Secretary-General on Legal Issues related to Piracy off the Coast of Somalia, ‘Summary: A plan of 25 proposals’ (S/2011/30) at 12 (hereafter, the Jack Lang Report) 13 at 15

¹⁶ Jack Lang Report, *ibid*, 13 at 15

¹⁷ OBP (2013), above n 5, 3, PBP (2014), above n 5, 38, OBP (2015), above n 2, 27

¹⁸ OBP, ‘The Human Cost of Somali Piracy 2011’ (2012) 8-9, 20 at oceansbeyondpiracy.org/sites/default/files/hcop_2011.pdf

days awaiting help from naval forces.¹⁹ It is worth highlighting that up until 2011-2012, when piracy reached its peak, seafarers did not receive any anti-piracy training or counselling, and the seafarers who come from developing countries still do not have access to these services.²⁰ This means that seafarers are prepared only for the traditional hardships experienced at sea, but not for exchange of fire and armed attacks, as if in a warzone. The first clinical research conducted on the psychological impact of piracy on seafarers shows that they do not have enough 'mental preparation' for pirate attacks and suffer increased anticipatory stress about traversing known zones of piracy.²¹ The same results were released after a survey of the IMB on the feelings of seafarers about piracy across regions, in which on a scale of 1 to 5, seafarers rated with a 4 their stress and scare when they have to transit sea routes off Somalia, and with a 3.5 their inability to focus on work.²² In addition to the risks of being injured or killed and the great distress that seafarers face upon a violent pirate attack, they also face the risk of being taken hostages. In the same IMB survey on seafarers' concerns about specific events in Somali piracy, seafarers rated with more than 4 out of 5 their concern about being kidnapped by pirates.²³ It was noted that there has been no successful hijacking over the last year, but at the time of writing, there are still 26 seafarers being held hostages by pirates.²⁴ The hostages, who are still in captivity, are considered to be 'high risk' hostages, as there is an increased likelihood of abuse or death and minimum chances of release.²⁵ Apart from the hostages still held in captivity, the abuses that seafarers have already suffered at the hands of pirates should not be ignored. Hostages have been facing extremely long periods in captivity, with periods of detention on the increase. In 2010, the average of detention was five months,²⁶ in 2011 it increased to six months,²⁷ and for the seafarers captured in 2012 the

¹⁹ According to the IMO, 'a Citadel is a designated pre-planned area purpose built into the ship where, in the event of imminent boarding by pirates, all crew will seek protection'. See IMO, 'Piracy and Armed Robbery against ships in waters off Somalia' (MSC.1/Circ.1339) (2011) 37.

²⁰ Marts, above n 11, 31. It is worth highlighting that the majority of seafarers come from developing and other non-OECD countries, OBP (2013), above n 5, 39.

²¹ MS Garfinkle, et al, 'The psychological impact of piracy on Seafarers' (2012) *The Seaman's Church Institute*, 5-6

²² OBP (2013), above n 5, 8

²³ *ibid* 2

²⁴ UNODC, above n 3, 1 and OBP (2015), above n 2, 29

²⁵ OBP (2013), above n 5, 39, 40-41

²⁶ *ibid* 16

²⁷ *ibid* 11

average detention period was more than 11 months.²⁸ Most of the hostages that remain in captivity have been detained for more than two years.²⁹

The conditions of detention of seafarers have also changed dramatically. Until about 2010, the predominant belief held by officials and presented by the media was that pirates are ‘humane captors’ and treat hostages well.³⁰ For example, after the release of the French yacht, *Le Ponant*, which was seized in 2008 with its 30 crew members, it was broadcast that a *Good Contact Guide* was found on board outlining the appropriate treatment of hostages.³¹ However, the accounts of released hostages refuted the theories that pirates treat them with respect. The crews of 23 released vessels in 2010 and 2011 and eight released vessels in 2012 and 2013 reported to the IMB the abuses they were subjected to in captivity.³² The accounts given by the 11 remaining hostages, who escaped from *MV Albedo*, and the seven released hostages of *MV Asphalt Venture* in 2014 also brought to light new information about the ill-treatment inflicted by pirates.³³ All hostages stated that they suffered regular threats of physical violence, continuous psychological stress and abuse, confinement, loss of privacy, and loss of self-esteem. The reports of physical abuses that hostages suffered, including being punched, pushed, slapped, and burned by cigarettes, increased from 50 per cent in 2010-2011 to 100 per cent in 2012-2013. In addition, 10 per cent and 15 per cent of the hostages released in 2010-2011 and 2012-2013 respectively reported extreme cases of violence, including being tied up in the sun for hours, locked in freezers, and having fingernails pulled out with pliers. Other reported abuses included systematic isolation, deprivation of privacy, malnutrition and lack of drinkable water.³⁴ Pirates also put psychological pressure on their hostages, as they make them phone their relatives to beg for help at gunpoint, tell them that their families abandoned them or the negotiations broke down and their organs will be cut out and sold on

²⁸ *ibid* 4. According to OBP, the crew of *FV Naham 3* has been in captivity for 1,140 days, OBP (2015), above n 3, 30.

²⁹ *ibid*

³⁰ OBP (2012), above n 19, 12

³¹ Marts, above n 11, 8

³² OBP (2013), above n 5, 6

³³ OBP (2015), above n 3, 30-31

³⁴ K Houreld, ‘AP Interview: Somali pirates torturing hostages’ (2011) *The Guardian* at www.guardian.co.uk/world/feedarticle/9479830 (accessed 11 October 2015), The Telegraph, ‘Somali pirates raise ransom stakes’ (2011) at www.telegraph.co.uk/news/worldnews/piracy/8440471/Somali-pirates-raise-ransom-stakes.html (accessed 11 October 2015)

the open market.³⁵ The psychological impact on seafarers is irreversible, as almost all seafarers held hostages suffer various forms of post-trauma disorders.³⁶

Overall, the evolving nature of Somali piracy has had a significant human cost, which is often overlooked in the literature, as seafarers suffer a number of human rights violations upon a pirate attack and while in captivity. Their right to life is constantly threatened, they remain in captivity for prolonged periods of time and they are deprived of their right to privacy. The forms of physical and psychological ill-treatment that hostages suffer are also severe and can, in some instances, amount to torture.³⁷ The following assessment of some of the most vital counter-piracy responses will demonstrate that States have failed to address the issue of the violations of the human rights of seafarers.

3. HUMAN RIGHTS OBLIGATIONS AND HUMAN RIGHTS GAPS IN THE FIGHT AGAINST PIRACY

The impact of Somali piracy shocked the international community that adopted a range of measures to combat and prevent it. The effectiveness of the international counter-piracy efforts is uncontested in the light of the decline of Somali piracy over the last year. It is also incontrovertible that States have taken note of the suffering of seafarers in their fight against piracy. The EU Deputy Secretary General for the External Action Service, Maciej Popowski, who took over the lead of the Contact Group on Piracy off the coast of Somalia (CGPS) on behalf of the EU, reiterated the commitment of the international community to tackle the human cost of piracy. Acting as Chairman of the CGPS, the EU delegate stated that the first priority is to have ‘zero ships and zero seafarers in the hands of Somali pirates’ further adding that ‘we must never lose sight of the humanitarian cost of piracy and must continue to support

³⁵ OBP (2013), above n 5, 7, OBP (2014), above n 5, 40, Palmer, above n 1, 66

³⁶ Garfinkle, above n 21, 8, OBP (2015), above n 2, 32-33, 87-90

³⁷ Although the legal term of torture requires that the pain or suffering ‘is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’, as per Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, here it is used to indicate the ‘torturous nature’ of the act, as perceived by the victims. See MD Evans, ‘State Responsibility and the European Convention of Human Rights: Role and Realm’ in M Fitzmaurice & D Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004) 150-151. See also the accounts given by released seafarers on Save Our Seafarers, ‘Pirates tortured us, says freed MV Albedo sailor’ at www.saveourseafarers.com/pirates-tortured-us-says-freed-mv-albedo-sailor.html (accessed 11 October 2015).

those who have paid the highest price'.³⁸ Although States are aware of the suffering of seafarers, they have failed to acknowledge that one of the humanitarian costs is the actual violation of the human rights of seafarers. As it will be explained below, the recognition of the breaches of the human rights of seafarers means that States could have positive obligations to protect seafarers, while also complying with their negative obligations in the fight against piracy. Nevertheless, States have not seriously considered their human rights obligations yet and this is reflected in the current counter-piracy responses that suffer human rights gaps.

3.1. THE UNSC RESOLUTIONS

The UNSC has adopted a number of Resolutions that focus on piracy³⁹ or the chaotic situation in Somalia that contributes to piracy.⁴⁰ On 2 June 2008, the UNSC first used the powers under Chapter VII of the UN Charter and authorised States, which cooperate with the Transitional Federal Government of Somalia (TFG) in the fight against piracy, to enter the territorial waters of Somalia for the purpose of repressing piracy.⁴¹ Although this decision may seem revolutionary, the UNSC was extremely careful when crafting the Resolution. A number of strict restrictions in relation to the time and space, the protection of innocent passage, respect for international law and cooperation with the TFG limit the use of these powers. This cautious approach of the UNSC has been seen as more hortatory than a revolutionary one that could bring effective results in the fight against piracy,⁴² but it could be understood in the light of the paramount importance for the UNSC to clarify and ensure that this authorisation is a special exception which will not create customary international law.⁴³ However, what cannot be explained is that the UN, as a major international human rights actor, failed to prioritise the protection of seafarers against the increasing violence they suffer and adopt firm measures that could ensure their safety. First of all, the delay of the

³⁸ CGPS, March Newsletter 2014, 1

³⁹ UNSC Resolutions 1816(2008), 1838(2008), 1846(2008), 1851(2008), 1897(2009), 1918(2010), 1950(2010), 1976(2011), 2015(2011), 2020(2011), 2077(2012), 2125(2013)

⁴⁰ UNSC Resolutions 1844(2008), 1872(2009), 1964(2010), 2010(2011), 2036(2012), 2067(2012)

⁴¹ UNSC Resolution 1816(2008) at 7

⁴² For a more detailed analysis of the restrictions of the UNSC Resolution 1816(2008) see T Treves, 'Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia' (2009) *E.J.I.L.*, 403-405, T Treves, 'Piracy and the International Law of the Sea' in Guilfoyle, above n 11, 130.

⁴³ D Guilfoyle, *Shipping interdiction and the law of the sea* (Cambridge: CUP, 2009) 68-69, Treves (2009), *ibid.*, 403

UNSC to officially acknowledge the danger of hostage-taking and the violence seafarers suffer left few chances for resolute decisions. While the figures started showing the escalation of violence and the increased hostage-taking incidents since 2007, it was not until April 2011 that the UNSC officially referred to hostages and the adverse impact on their families and called for the immediate release of hostages.⁴⁴

The failure of the UNSC to stress the human rights suffering of seafarers earlier had a domino effect of further delayed recognition by States and maritime officials of the suffering of seafarers.⁴⁵ It was not until 2011 that it was officially acknowledged that hostages are ‘systematically tortured’ and physically abused by pirate gangs.⁴⁶ The acknowledgement that there are seafarers that face serious dangers and human rights violations could trigger the responsibility of the flag State to protect them. It is submitted that the protection of the human rights of hostages could be established through the combination of the relevant provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and developments of international human rights law.

Pursuant to the 1982 UNCLOS, vessels are subjected to the exclusive jurisdiction of their flag State on the high seas (Article 92) and the latter has to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’. The duties of flag States include, amongst others, their obligation to apply maritime, shipping, criminal and civil laws to their flagged ships.⁴⁷ This means that while the 1982 UNCLOS sets out the core framework of piracy and aims to address the traditional hardships that seafarers experience at sea, it cannot protect the human rights of seafarers.⁴⁸ This is not to say that this gap in the protection of seafarers cannot be filled. The term ‘jurisdiction’ of

⁴⁴ UNSC Resolution 1976 (2011) preambular paragraph. The first reference to the safety of seafarers and other persons was made in the UNSC Resolution 1950 (2010) without any further call for action.

⁴⁵ The UNSC generally referred to the escalation of violence in pirate acts in its UNSC Resolutions 1838(2008), 1950(2010), 1976(2011), 2015(2011), but did not specify that the use of violence by pirates targets seafarers and hostages.

⁴⁶ n 34 above

⁴⁷ For the duties of flag States see RA Barnes, ‘Flag States’ in DR Rothwell, AG Oude Elferink, KN Scott & T Stephens (eds) *The Oxford Handbook of the Law of the Sea* (Oxford: OUP, 2015) 304-324 and Y Tanaka, *The International Law of the Sea* (Cambridge: CUP, 2015) 157-159.

⁴⁸ T Treves has argued that many provisions of the 1982 UNCLOS can be seen from the viewpoint of human rights law, T Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 *Berkeley Journal of International Law* 1-14.

the jurisdiction clauses of the various human rights treaties has been broadly interpreted, and this might allow some room for suggesting that flag States, in addition to their maritime, shipping, criminal and civil laws, also have to ensure that their human rights laws are complied with on board their flagged vessels. The Human Rights Committee (HRC) has interpreted the jurisdictional clause of the International Covenant on Civil and Political Rights (ICCPR) (Article 2(1)) broadly and concluded that contracting parties ‘must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.⁴⁹ In the key case of *Lopez Burgos v Uruguay*, the HRC concluded that a State can be ‘held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State.’⁵⁰ The *travaux préparatoires* of the European Convention on Human Rights (ECHR) also indicate that it was within the intentions of the drafters to avoid strict jurisdictional criteria, such as a territorial reference and hence, the final provision (Article 1) did not include any strict requirements.⁵¹ Under the current development of the ECtHR jurisprudence, the human rights protected by the Convention shall be secured extra-territorially when States have effective control over individuals (the personal link) or a territory (the spatial link)⁵² with recent case law showing that the Court also takes into account the conduct of Contracting Parties abroad for the purposes of asserting authority and assuming control over individuals.⁵³ The personal link is established when a person is brought under the jurisdiction of a State.⁵⁴ In the context of piracy, the personal link is

⁴⁹ HRC, General Committee No.31 (2004) CCPR/C/21/Rev.1/Add.13 at 10. See also the HRC, General Comment No.24 (1994) CCPR/C/21/Rev.1/Add.6 at 7 and the discussion in K Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff, 2012) 17-41 and M Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Utrecht: Intersentia, 2009) 92-105.

⁵⁰ *Lopez Burgos v Uruguay*, Communication No. 52/79 (1981) at 12.3. See also Tomuschat’s individual opinion submitted under rule 94 (3) of the Committee’s provisional rules of procedure Communication No.R.12/52.

⁵¹ Council of Europe, Collected Edition of the ‘*Travaux Préparatoires*’ of the European Convention on Human Rights vol. III (The Hague: Martinus Nijhoff, 1977) 200. See also Da Costa, above n 49, 93-96 and Gondek, above n 49, 91-92.

⁵² M Milanovic, *Extraterritorial application of human rights treaties: law, principles, and policy* (Oxford: OUP, 2011) 118-127, M Gondek, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalisation?’ (2005) 52 *N.I.L.R.* 370-377

⁵³ *Jaloud v Netherlands* (2014) (Application no.47708/08)

⁵⁴ *Cyprus v Turkey* (1975) 2 DR 125 at 136, *Öcalan v Turkey* 2005-IX; 41 EHRR 985 at 91, *Hassan v UK* (2014) (Application no.29750/09) at 76. For the spatial link see below 37-38.

particularly relevant to the seized vessels and seafarers, as the ECtHR has confirmed that a State has jurisdiction over a vessel flying its flag⁵⁵ and over the persons on board vessels intercepted by its State agents.⁵⁶

In the light of the emerging threats posed to the human rights of seafarers and the broader interpretation of jurisdiction of the human rights treaties, it could be argued that flag States should ensure that their human rights legislation is also complied with on board their flagged ships. This could permit the human rights of those seafarers attacked by pirates to be better protected, as victims should be considered to be within the jurisdiction of the flag State for the purposes of human rights. The latter could give rise to the obligation of a flag State to take preventive measures against pirate attacks or put an end to the captivity of hostages. That said, the preventive human rights obligations of States are qualified, which means that States are responsible for protecting individuals against the violations they suffer by other individuals, when they know or ought to have known that individuals are at risk.⁵⁷ This obligation was confirmed by the ECtHR in the case of *Finogenov and others v Russia*, which remains a key case for hostage-taking issues and the protection of hostages.⁵⁸ In this case, the Strasbourg Court examined the Dubrovka theatre siege and clarified that Russia would have a duty to take specific measures and prevent the attack only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life.⁵⁹ The obligation of States to prevent human rights violations committed by non-state actors has been further outlined and enforced through cases involving extraditions or refoulement. The ECtHR has established that a State can be found acting in breach of its human rights obligations by exposing an individual to ill-treatment or other human rights violations, even if such treatment is imposed by non-state actors.⁶⁰

⁵⁵ *Banković and Others v Belgium and other 16 Contracting States* (2001) (Application no.52207/99) at 67, 73

⁵⁶ See also the discussion below 31-32.

⁵⁷ *E and others v UK* (2002) (Application no.33218/96) at 22, *Z and others v UK* (2001) (Application no.29392/95) at 73, *Osman v UK* (1998) EHRR 1998-VIII at 115, *Opuz v Turkey* (2009) (Application no.33401/02) at 148

⁵⁸ *Finogenov and others v Russia* (2012) (Applications nos.18299/03 and 27311/030)

⁵⁹ *ibid* at 209

⁶⁰ *Soering v UK* (1989) 11 EHRR 439 at 91, 97, *Chahal v UK* ECHR 1996-V1855 (1997) at 80, *Saadi v Italy* (2008) (Application no.37201/06) at 138, *M.S.S. v Belgium and Greece* (2011) (Application no.30696/09) at 357-358, 366-367

In accordance with the existing jurisprudence, the threshold for engaging State protection in the context of piracy would seem to require establishing whether flag States knew of a ‘real and immediate’ risk to life. In the context of piracy, it is now uncontested that seafarers traversing the High Risk Area (HRA)⁶¹ are known to be at risk.⁶² Furthermore, the state-of-the-art equipment of vessels permits the crews to immediately inform the piracy reporting centres, such as the UK Maritime Trade Operations (UKMTO), the EU Maritime Security Centre – Horn of Africa (MSCHOA), the Combined Maritime Forces (CMF) and independent naval forces of an imminent pirate attack.⁶³ This means that flag States bound by the ECHR may be found acting contrary to their human rights obligations, if they are aware of an imminent attack upon a vessel, but fail to take action to prevent the attack and the taking of the crew hostages.⁶⁴ It has also been argued that States might be found to be acting in breach of their preventive obligations, when they knowingly send seafarers to piracy sea zones, without providing adequate training and counselling on how to deal with potential pirate attacks.⁶⁵

Although States have positive obligations to protect the human rights of seafarers against the violations they suffer in the context of piracy, the UNSC has failed so far to put these violations in context. While the drafters of the 1982 UNCLOS were not expected to predict the brutal attacks against seafarers by pirates and provide for the protection of the human rights of seafarers in the context of piracy, the UNSC had become aware of these violations. However, the hortatory language of the UNSC Resolutions and the delayed acknowledgement of the suffering of seafarers by the UNSC have allowed States to escape their human rights obligations to the victims of piracy. On the contrary, it will now be shown

⁶¹ According to the IMO, the HRA ‘defines itself by where pirate activity and/or attacks have taken place, above n 19, 4.

⁶² MD Evans & S Galani, ‘Piracy and the Development of International Law’ in Koutrakos, above n 11, 356

⁶³ For more information on the piracy reporting centres, see R Geiss, & A Petrig, *Piracy and Armed Robbery at Sea* (Oxford: OUP, 2011) 28-29.

⁶⁴ S Piedimonte Bodini, ‘Fighting Maritime Piracy under the European Convention on Human Rights’ (2011) *E.J.I.L.* 839, E Papastavridis, ‘European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?’ in M Fitzmaurice and P Merkouris’ (eds), *The Interpretation and Application of the ECHR—Legal and Practical Implications* (Leiden, Martinus Nijhoff Publishers, 2013), 129-130, T Obokata, ‘Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression?’ (2013) 17 *IJHR* 27

⁶⁵ Obokata, *ibid*, 29

that the UN and States have been extremely cautious about ensuring compliance with the protection of the human rights of pirates.

3.2. CRIMINAL RESPONSES

The UNSC through its resolutions has repeatedly called States to criminalise piracy and adopt a legal framework for the effective prosecution of pirates.⁶⁶ To the question of why the UN has been striving to establish effective prosecution mechanisms, when piracy is the quintessential example of universal jurisdiction and all States have jurisdiction to prosecute the *hostis humani generis*, the answer is given by the low rates of pirates prosecuted until 2011.⁶⁷ In 2011, 738 pirates were detained in 13 countries as suspects or guilty of engaging in piracy.⁶⁸ This number was only a small fraction of the 2000 pirates who have been apprehended since December 2008, and shows that only one out of 10 captured persons was being prosecuted.⁶⁹ This begs the question of why States have been reluctant to prosecute pirates whose criminal activities have ‘contaminated’ the sea routes causing unprecedented economic and human costs. The roots of this problem will be assessed with a view to highlighting the impact that these failures have on the protection of the human rights of seafarers.

3.2.1. *Practical constraints*

As outlined from the outset, it must be noted that the case of piracy in Somalia is more complicated, since States have been authorised to enter the Somali territorial waters for the purpose of repressing piracy.⁷⁰ Until June 2014, the Somali territorial sea was 200nm making the situation more complex during the peak of pirate attacks, as pirates apprehended within the extended Somali territorial waters were subject to different jurisdictions, such as that of

⁶⁶ UNSC Resolutions 1846(2008), 1851(2008), 1897(2009), 1918(2010), 1950(2010), 1976(2011), 2015(2011), 2020(2011), 2077(2012), 2125(2013)

⁶⁷ Evans & Galani, above n 62, 344-350

⁶⁸ Jack Lang Report, above n 15, 20-21 at 42-43

⁶⁹ Report of the Secretary-General on specialised anti-piracy courts in Somalia and other States in the region (Anti-piracy Courts Report) (S/2012/50) 5

⁷⁰ See the discussion above 23-24.

the flag, port or coastal states.⁷¹ This does not seem to be the case anymore, as, on 30 June 2014, the Somali President declared a 12nm territorial sea and proclaimed a 200nm EEZ.⁷²

Despite the UN calls for cooperation in determining jurisdiction, the ‘disposition and logistics’⁷³ labyrinth has become more complicated in combination with the political and human rights constraints related to the prosecution of suspected pirates.⁷⁴ Moreover, the release, instead of detention and prosecution, of pirates has been considered to be more practical.⁷⁵ The transfer of pirates to ports, after their capture, may need a lengthy and expensive diversion. For naval forces, this means that more vessels would remain exposed to the danger of being attacked in the meantime. Therefore, military forces prefer to be engaged in a ‘catch and release’ strategy, or disruption operations, in which arms and equipment used in committing piracy are seized or disposed of, but pirates are released after being captured.⁷⁶ This ensures that vessels are not left unprotected for a considerable matter of time. Despite the efforts to increase the arrests and prosecution of suspected pirates, these types of operations ‘remain the most common naval counter-piracy tactic for a variety of practical, operational and legal reasons’, some of which are explained below.⁷⁷

3.2.2. *Political unwillingness*

Kenya, which was the first State to exercise its universal jurisdiction in 2006 and has been active in prosecuting pirates, noted that other States do not have the political willingness to exercise their jurisdiction.⁷⁸ There are different reasons that make States reluctant to prosecute pirates. One of the reasons is the fear that there might be retaliation against the vessels that fly their flags; and hence, States are willing to prosecute suspects only when their

⁷¹ Law No. 37 on the Territorial Sea and Ports, of 10 September 1972 at www.somalilandlaw.com/Territorial_Sea_and_Ports.pdf (accessed 11 October 2015)

⁷² Proclamation by the President of Somalia, dated 30 June 2014, at www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SOM_2014_Proclamation.pdf (accessed 11 October 2015)

⁷³ UNSC Resolution 1816(2008) at 11

⁷⁴ *ibid*

⁷⁵ D Guilfoyle, ‘Counter-piracy law enforcement and human rights’ (2010) 59 *I.C.L.Q.* 142, S De Bont, ‘Prosecuting pirates and upholding human rights law: taking perspective’ (2010) *One Earth Future* 33-34

⁷⁶ For the ‘catch and release’ approach see A Murdoch, & D Guilfoyle, ‘Capture and disruption operations: the use of force in counter-piracy in Somalia’ in Guilfoyle, above n 11, 158-163.

⁷⁷ *ibid* 163

⁷⁸ Anti-piracy Courts Report, above n 69, 19 at 61, 27 at 71-72

national interests are affected.⁷⁹ Moreover, there are States that do not wish to be left with any apprehended pirates that cannot be deported after the prosecution or the imprisonment due to claims of asylum or non-refoulement obligations.⁸⁰ The British Foreign Office, for instance, although it has never provided any legal basis for the potential asylum claims made by pirates, has repeatedly warned the Royal Navy against detaining captured pirates.⁸¹ Therefore, the United Kingdom has entered into Memoranda of Understanding (MOUs) with the countries of the region that permit the transfer of pirates and trial before Courts in the region.⁸²

The unwillingness of some States to shoulder their responsibilities for the proper prosecution of pirates has made these few States that detain and try pirates to refuse to further undertake this heavy burden alone. In March 2010, Kenya gave a six-month notice of withdrawal from the bilateral agreements it had entered into with Canada, China, Denmark, the EU, the United Kingdom and the United States, but consented to consider case-by-case transfers.⁸³ These kinds of refusals may force other States to undertake piracy prosecutions themselves, but it also exposes the danger of more pirates being released without any prosecution posing renewed threats to seafarers.

3.2.3. *Human Rights Considerations*

Furthermore, there are human rights constraints that prevent the effective detention and prosecution of pirates. The States bound by the ECHR have to consider at least the three following human rights restrictions in the manner they treat pirates: firstly, they cannot detain on board arrested pirates for a prolonged period of time without judicial supervision;⁸⁴

⁷⁹ Jack Lang Report, above n 15, 27 at 71-72, O Hawkins, 'What to do with a captured pirate?' (2009) *BBC News* at news.bbc.co.uk/1/hi/7932205.stm (accessed 11 October 2015), BBC News, 'German navy foils Somali pirates' (2008) at news.bbc.co.uk/1/hi/7799796.stm (accessed 11 October 2015), Guilfoyle, above n 43, 71

⁸⁰ De Bont, above n 78, 24-25

⁸¹ YM Dutton, 'Pirates and Impunity: Is the threat of asylum claims a reason to allow pirates to escape justice?' (2011) *Fordham Int'l L J*, 34, 240, A Skordas, 'The Dark Side of Counter-piracy Policies' in Koutrakos, above n 11, 318, De Bont, above n 75, 24

⁸² The United Kingdom has entered into MOUs with Kenya, Seychelles, Tanzania and Mauritius and Nigeria.

⁸³ JT Gathii, 'Kenya's Piracy Prosecutions' (2010) *A.J.I.L.* 104, 435, Treves (2013), above n 42, 140, D Thym, 'Transfer Agreements for Pirates Concluded by the EU – a Case Study on the Human Rights Accountability of the Common Security and Defence Policy' in Koutrakos, above n 11, 170.

⁸⁴ *Medvedyev and others v France* (2010) 51 E.H.R.R. 39

secondly, they cannot deport pirates to States where they might face the risk of torture;⁸⁵ and finally, they cannot transfer pirates to countries where their right to a fair trial might be denied.⁸⁶ The ECtHR has now well-established case law that protects the human rights of those on board intercepted vessels. In both the *Medvedyev* and *Rigopoulos* cases, the ECtHR found that a 13-day and 16-day detention, respectively, on board of the vessel for the purposes of transferring the captured persons to national ports were incompatible with the meaning of promptness under Article 5(3) of the ECHR.⁸⁷ However, in these cases no violation was found because the delays were justified under the exceptional circumstances of these cases. These obligations have been reiterated by cases examined in the context of counter-immigration operations. In the key case of *Hirsi Jamaa*, the ECtHR held that the applicants, who were originally found on board of vessels that were intercepted by the Italian naval forces, and were then transferred to Italian military ships and returned to Libya, ‘were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities’.⁸⁸ Therefore, the ECtHR found that the alleged violations brought before it by the applicants fell within Italy’s jurisdiction.⁸⁹

In line with this jurisprudence and within the context of piracy, the Rotterdam District Court also found that a time span of 40 days between the apprehension of a Somali pirate and his presentation to a Judge brings about a violation of Article 5(3) of the Convention, but this was found irrelevant to the criminal proceedings.⁹⁰ The ECtHR also examined cases brought by Somali pirates who challenged the legality of their detention by French agents.⁹¹ This time the question of jurisdiction was not even raised by France that accepted that the arrested pirates were within the French jurisdiction for the purposes of Article 1 of the Convention. In this light, the Court concluded that the six days the Somalis spent in detention between their

⁸⁵ above n 60

⁸⁶ *Othman (Abu Qatada) v UK* (2012) (Application no.8139/09)

⁸⁷ *Medvedyev v France* (2010) at 65-69, *Rigopoulos v Spain* (1999) (Application no.37388/97)

⁸⁸ *Hirsi Jamaa and Others v Italy* (2012) (Application no.27765/09) at 81

⁸⁹ *ibid* at 82. See also *Sharifi and others v Italy and Greece* (2014) (Application no.16643/09) at 214-225, *The Haitian Centre for Human Rights et al v United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R (1997) at 183-188, *P.K. et al v Spain*, Communication No. 323/2007, UN Doc. CAT/C/41/D/323/2007 of 21 November 2008 at 8.2

⁹⁰ *Samanyolu Case*, Judgment of 17 June 2010, LJN: BM8116, Rotterdam District Court, 10/600012-09, 6-7

⁹¹ *Ali Samatar and Others v France* (2014) (Application nos.17110/10 and 17301/10) and *Hassan and Others v France* (2014) (Application nos.46695/10 and 54588/10)

arrest and transfer to France did not breach Article 5(3).⁹² However, the Court found France in breach of Article 5(3) due to the two-day detention of the pirates in France, before they were brought before a judge.⁹³

In addition, the absolute prohibition of torture under the ECHR may challenge the decisions of European governments to transfer pirates to countries where the conditions of detention amount to inhuman and degrading treatment, or where the death penalty is still in use.⁹⁴ Overcrowding, lack of proper medical treatment and allegations of ill-treatment are amongst the most significant defects of the detention facilities of the region that raise concerns about the safety of the human rights of pirates.⁹⁵ In this vein, the Court of Administrative Law in Germany declared illegal the transfer of pirates to Kenya due to poor conditions of detention.⁹⁶ Furthermore, the concerns over the use of capital punishment, which is prohibited by Danish law, made the Danish navy release captured pirates instead of surrendering them to Somali authorities.⁹⁷

The international community seems to have seriously contemplated its human rights obligations to pirates and have adopted a number of robust measures to uphold this aim. The UN constant calls for criminalising piracy have always been accompanied by the legal safeguard that the incarceration and conviction of pirates must be consistent with the applicable human rights law. Both the UN and EU made clear that no agreements regarding the transfer and trial of pirates will be allowed to enter into force, unless the contracted parties guarantee the protection of the human rights of pirates.⁹⁸ The EU-Kenya agreement, for example, contains a number of human rights safeguards, such as legal safeguards against torture or guarantees for prompt and fair trials.⁹⁹ The importance that the EU attributes to the protection of the human rights of pirates has also been stressed by the requirement for

⁹² *Ali Samatar*, *ibid*, at 41-55, *Hassan*, *ibid*, at 86-97

⁹³ *Ali Samatar*, *ibid* at 56-59, *Hassan*, *ibid*, at 98-104

⁹⁴ *above* n 63

⁹⁵ For the prison facilities of the region and the conditions of detention, see *Anti-piracy Courts Report*, *above* n 69, 21 at 69-70, *Gathii*, *above* n 83, 430-435 and *Geiss & Petrig*, *above* n 63, 174-177.

⁹⁶ H Friman, & J Lindborg, 'Initiating Criminal Proceedings with Military Force: Some Legal Aspects of Policing Somali Pirates by Navies' in Guilfoyle, *above* n 11, 194

⁹⁷ A Murdoch, 'Recent Legal Issues and Problems relating to Acts of Piracy off Somalia' in CR Symmons (ed) *Selected Contemporary Issues in the Law of the Sea* (Leiden: Brill, 2011) 150-51

⁹⁸ *Anti-piracy Courts Report*, *above* n 69, 9 at 24, 13-14 at 34

⁹⁹ *Thym*, *above* n 83, 167-182

constant monitoring of the situation of pirates after their transfer to the State that will be prosecuted.¹⁰⁰ More importantly, the UN has invested large amounts of money in reforming the Courts and prison facilities in Somalia and other countries in the region with a view to making them human rights compliant.¹⁰¹ In addition, the Counter Piracy Programme (CPP) is aimed at reforming the domestic courts and detention facilities in Somalia, Seychelles, Kenya, Mauritius and Tanzania by training personnel, providing interpretation services and offering training courses and rehabilitation assistance to detained pirates.¹⁰² The cost of the CPP is estimated to reach US\$30.49 million between early 2012 and mid-2014, of which US\$9.38 million has already been contributed.¹⁰³

Although these human rights considerations and efforts should be commended, especially after taking into account that the ‘foot soldiers’ of piracy are involved in pirate activities not out of choice but as a matter of survival,¹⁰⁴ we are now left with the peculiar outcome of seriously considering the human rights of pirates, but losing sight of the rights of victims. It flows logically that as pirates fall under the jurisdiction of States, when arrested and detained on vessels flying their flag, the victims of piracy should also fall under the same jurisdiction, when arrested and detained by pirates on board. It seems only right that the enhancement of the human rights safeguards aiming to protect pirates from violations of their right to freedom from illegal detention and torture should apply *mutatis mutandis* to the victims of piracy. In the legal sphere, however, these arguments can be contested on the ground that pirates are detained by State agents, while seafarers are attacked and abused by non-state actors. It was noted from the outset of this paper that according to the traditional State responsibility principle, States are responsible only for wrongful acts attributed to them and thus, State responsibility cannot be triggered for the illegal acts of pirates against their victims.¹⁰⁵ This has the unorthodox consequence of protecting the perpetrators of pirate criminal activities, but not the victims. Thus, it is suggested that the solution to these human rights gaps is to

¹⁰⁰ *ibid* 175

¹⁰¹ UNODC, ‘Counter Piracy Programme (CPP)-Support to the Trial and Related Treatment of Piracy Suspects’ (2013) 2

¹⁰² *ibid* 2, 15. See also the recent developments in UNODC, ‘Maritime Crime Programme – Annual Report 2014’.

¹⁰³ OBP, ‘Economic Cost of Somali Piracy 2012’ (2013) 27–30 at oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_1.pdf

¹⁰⁴ World Bank (a), n 4 above, 27-28, 87

¹⁰⁵ See the discussion above 17.

make use of the alternatives that the human rights framework offers that could hold States responsible for equally protecting the rights of the victims of piracy.

3.2.4. *The Impact of the Criminal Counter-Piracy Responses on the Human Rights of Seafarers*

States, for a considerable period of time, let pirates escape justice due to practical constraints, political unwillingness and human rights deliberations. Seafarers could see their abductors being released and posing renewed threats to their welfare. States tried to address these three constraints in the prosecution of pirates by injecting lots of money in reforming the Courts and prisons in the region. Currently, seafarers see their abductors' human rights being rigidly safeguarded, while theirs are still being overlooked. The effectiveness and sustainability of these responses are yet to be seen. It has been evidenced that the prosecution rates have not changed fundamentally and there have also been reported cases in which corrupted officials in the region authorised the release of pirates on dubious justifications.¹⁰⁶ The inclusion of piracy under the jurisdiction of the newly established African Court of Justice and Human Rights might improve the effectiveness of the prosecution system and relieve the burden of the Courts in the region.¹⁰⁷ However, the unwillingness of the Western States to share the prosecution backlog and the incapacity of international community to carry on spending money on pirate detention facilities or monitoring the conditions of detention in the long run will also affect the effectiveness of counter-piracy efforts. As a result, seafarers face the risk of being confronted again with pirates who re-embark on pirate attacks after escaping justice due to the strict human rights precautions.

3.3. NAVAL OPERATIONS

The NATO *Operation Ocean Shield* and EU Naval Forces (EUNAVFOR) *Operation Atalanta*, as well as independent national naval forces from the US, China, India, Japan and others, have been actively involved in the fight against piracy in the region.¹⁰⁸ These naval operations have proven a vital tool against piracy and amongst others, they have also been

¹⁰⁶ Anti-piracy Courts Report, above n 69, 4-5 at 10. See also the figures available on Maritime Crime Programme – Indian Ocean at www.unodc.org/unodc/en/piracy/indian-ocean-division.html (accessed 11 October 2015), Palmer, above n 1, 98.

¹⁰⁷ Article 28F of Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2012)

¹⁰⁸ Jack Lang Report, above n 15, 9-10 at 37-41

engaged in a number of rescue missions aimed at releasing hostages. The successful outcomes of some of rescue missions were enough to spark enthusiasm and encourage more action of the same kind.¹⁰⁹ For instance, the rescue mission of Captain Phillips of the American-flagged *MV Maersk Alabama* by the US Navy in 2009 that was brought to life in the Hollywood movie *Captain Phillips* gives the impression of legendary missions in which commandos step in and save hostages in the most miraculous fashion.¹¹⁰ In practice, however, rescue missions do not always have a 'happy end'.¹¹¹ For example, in 2009, a French hostage was killed when the French forces stormed the yacht *Tanit* that had been hijacked in the Gulf of Aden.¹¹² Another raid by the Danish *Asbalon*, which operates under the command of NATO, resulted in the death of two hostages, who were badly injured by fire and died soon after.¹¹³ The Royal Navy has also been involved in similar raids, with one that claimed the life of a Yemeni national in 2008.¹¹⁴ A more deadly raid was conducted by the Indian Navy in 2008 claiming the lives of 15 seafarers on board.¹¹⁵

The unpredictable reactions of pirates during rescue missions pose further risks to the welfare of hostages. It has now become a standard practice for pirates to use seafarers as human shields during a rescue attempt.¹¹⁶ In other cases, when pirates become aware of naval

¹⁰⁹ C Coughlin, 'US Navy Seals rescued American hostages from Somalia – why won't Britain do the same?' (2012) *The Telegraph* at telegraph.co.uk/news/worldnews/piracy/9041774/US-Navy-Seals-rescued-American-hostages-from-Somalia-why-wont-Britain-do-the-same.html (accessed 11 October 2015)

¹¹⁰ A Fallon, 'Hostage captain freed after US firefight with Somali pirates' (2009) *The Guardian* at www.theguardian.com/world/2009/apr/12/us-captain-richard-phillips-freed-somali-pirates-maersk-alabama (accessed 11 October 2015)

¹¹¹ C Freeman, 'Captain Phillips: the forgotten hostages' (2013) *The Telegraph* at www.telegraph.co.uk/news/worldnews/piracy/10360674/Captain-Phillips-the-forgotten-hostages.html (accessed 11 October 2015)

¹¹² The Telegraph, 'French man killed in front of his son as commandos storm yacht held by pirates' (2009) at www.telegraph.co.uk/news/worldnews/piracy/5138317/French-man-killed-in-front-of-his-son-as-commandos-storm-yacht-held-by-pirates.html (accessed 11 October 2015)

¹¹³ BBC News, 'Denmark piracy raid off Somalia leaves two dead' (2012) available at www.bbc.co.uk/news/world-africa-17195162 (accessed 11 October 2015)

¹¹⁴ For more details see Murdoch and Guilfoyle, above n 76, 163-165.

¹¹⁵ Guilfoyle, above n 43, 271-294, Murdoch and Guilfoyle, *ibid*, 165-169

¹¹⁶ For example, it is reported that the majority of the fatalities in 2011 and 2012 occurred during rescue missions, because pirates were using hostages as human shields, OBP (2014), above n 5, 8

presence, they drag hostages on the deck and beat them until the naval vessel retreats.¹¹⁷ More extreme reactions could give rise to further dramatic incidents, such as the cruel murder of the four American hostages, who were shot on board the yacht *Quest*, while the American naval forces were on the way to conduct a rescue mission.¹¹⁸

Rescue missions can be vital for the release of hostages, particularly in cases that negotiations stall or there is no insurance behind hostages to pay the ransom, but under certain circumstances they can turn out to be fatal for hostages demonstrating how urgent it is that States comply with their traditional negative human rights obligations and refrain from committing human rights violations during their operations at sea. The ECtHR has clearly set a number of criteria that make rescue missions human rights compliant. It is now well-established that there is human rights compliance when a rescue mission is accurately planned in advance,¹¹⁹ including accurate evacuation plans and readiness for providing medical assistance;¹²⁰ the use of lethal force is only a last resort and absolutely necessary in defence of persons from unlawful violence;¹²¹ the modus operandi is carefully chosen to attain the primary aim of a rescue mission that should always be the protection of the lives of hostages;¹²² and the rescue team has taken all the precautions to minimise incidental loss of life.¹²³ Although these criteria were developed by the ECtHR after examining operations on land, there seems to be no reason why these could not apply to rescue missions at sea. This means that hostages should be entitled to human rights protection, and they could potentially bring claims under Article 2 against the States whose naval forces conduct rescue missions.

Whereas it was concluded that hostages could and should be protected during the conduct of rescue missions, two more legal barriers may arise. The first one derives from the extra-

¹¹⁷ D Howden, 'Somali pirates are using torture as defence shield' (2011) *The Independent* at www.independent.co.uk/news/world/africa/somali-pirates-are-using-torture-as-defence-shield-2202614.html (accessed 11 October 2015)

¹¹⁸ E MacAskill, 'Somali pirates kill four Americans' (2011) *The Guardian* at www.theguardian.com/world/2011/feb/22/four-americans-killed-somali-pirates (accessed 11 October 2015)

¹¹⁹ *McCann v UK* (1995) 21 EHRR 97 at 150, 200, *Andronicou and Constantinou v Cyprus* (1998) 25 EHRR 491 at 183-185, 213

¹²⁰ *Finogenov v Russia* (2012) at 232-236, 266

¹²¹ *Isayeva, Yusupova and Basayeva v Russia* (2005) (Applications nos.57947/00, 57948/00 and 57949/00) at 179, *McCann v UK* (1995) at 190

¹²² *Isayeva v Russia* (2005) (Application no.57950/00) at 191

¹²³ *Ergi v Turkey* (2001) 32 EHRR 18 at 79

territorial character of rescue missions. Sea operations conducted for the safe release of hostages take place miles away from the borders of States and thus, outside the traditional notion of their jurisdiction. This can be interpreted by States as absolving them of their human rights obligations. The second legal lacuna in the protection of hostages might arise from the fact that most of the rescue missions are not conducted by independent naval forces, but by vessels operating under the mandate of an international organisation (IO). For instance, does the responsibility of deaths or injuries caused by the German naval forces that act as Force Command of the EUNAVFOR *Operation Atalanta* lie with Germany or with the EU?

3.3.1 *The Question of Extra-territoriality: Are States Responsible for Protecting the Human Rights of Seafarers During Rescue Missions at Sea?*

The developments of extra-territorial human rights law, and the IO's responsibility, discussed below, could potentially offer solutions to these legal problems, but it is noted with concern that seafarers may remain exposed to human rights violations due to the limitations of the contemporary human rights framework. While it was explained that the human rights jurisprudence has now established that those arrested and detained at sea are brought within the jurisdiction of flag States, the question that remains is whether seafarers are brought within the jurisdiction of those States, which conduct rescue missions and employ lethal force at sea.

Apart from the personal link, discussed above, required for establishing extra-territorial human rights obligations, the case law developed on the occupied territories shows that States also have extra-territorial human rights obligations over the territories where they exercise effective control.¹²⁴ The extra-territorial application of the ECHR was seriously restricted in the case of *Banković*, but the criticism the case received seems to have made the Court gradually depart from it.¹²⁵ It is still worth noting that in *Banković*, the Court examined and

¹²⁴ HRC, *Concluding Observations regarding Israel* (2003) CCPR/CO/78/ISR at 11, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 at 112, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1970 16 at 125, *Loizidou v Turkey* (Preliminary Objections), ECtHR 23 March 1995 at 62, *Cyprus v Turkey* (1975) at 77-78

¹²⁵ See the commentary in R Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in F Coomans & MT Kamminga (eds) *Extraterritorial Application of Human*

addressed the responsibility of 17 of the Contracting Parties, acting under the NATO authorisation, for the alleged violations caused by the airstrikes launched against the former Yugoslavia, and concluded that the nature of jurisdiction under Article 1 of the Convention remains ‘essentially territorial’.¹²⁶ It was further added that the Convention can be applied extra-territorially only under exceptional circumstances, which require special justification.¹²⁷ In its more recent case law, the Court has shifted its focus again on the effective control States exercise on areas beyond their territories.¹²⁸ In the case of *Al-Skeini*, the Court found the UK to have ‘assumed authority and responsibility for the maintenance of security in South East Iraq’ and hence, the effective control the UK exercised over the territory brought the deceased within the jurisdiction of the UK.¹²⁹

The ECtHR made another step towards a more liberal interpretation of Article 1 of the Convention in the *Jaloud v the Netherlands* case. The complaint was brought against the Netherlands for the lack of an effective investigation into the killing of the applicant’s son outside a vehicle checkpoint established by the Netherlands for contributing to security in south-eastern Iraq. The Court relied on the *Al-Skeini* reasoning to examine whether the Netherlands had jurisdiction over the victim, but the nature of the checkpoint, as a vehicle one, could not leave much manoeuvre to the Court to rely on the spatial control that the Dutch forces might have had. The Court also considered the fact that the vehicle point was manned by Iraqi personnel, but found the Dutch forces to have retained the full command of the security operations.¹³⁰ More importantly, the Court considered the key issue to have been that the vehicle checkpoint was established for the sole purpose of the Dutch forces assuming control and asserting authority over the persons passing through.¹³¹ On this basis, the Court concluded that the victim was within the jurisdiction of the Netherlands, when killed.

Rights Treaties (Antwerp: Intersentia, 2004) 116 & D McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ in Coomans, 71-72.

¹²⁶ *Banković v Belgium* (2001) at 61

¹²⁷ *ibid*

¹²⁸ *Al-Skeini and Others v UK* (2011) (Application no.55721/07) at 149, *Ilascu and Others v Moldova and Russia* (2004) (Application no.48787/99) at 392-394 and *Issa and Others v Turkey* (2004) (Application no.31821/96) at 71, 74-75, *Catan and others v Moldova and Russia* (2012) (Applications nos.43370/04, 8252/05 and 18454/06) at 149-150

¹²⁹ *Al-Skeini v UK*, *ibid*, at 149

¹³⁰ *Jaloud v Netherlands* (2014) at 143, 150-151

¹³¹ *ibid* at 152

Whereas the Court made it clear, once again, that the ‘cause and effect notion’ of jurisdiction is not followed,¹³² it cannot be denied that the *Jaloud* reasoning lessens the threshold of effective control required by the earlier case law of the ECtHR.

It seems that the strict personal or spatial link required for holding States accountable for extra-territorial human rights violations might not be easily satisfied in the case of the rescue missions conducted in the Horn of Africa, as it could be difficult to argue that flag States establish effective personal or territorial, within the ECtHR notion, during rescue missions. This could leave hostages exposed to more human rights violations. The recent case of *Jaloud* suggests that the Court has taken a more liberal approach to the interpretation of jurisdiction. In this light, it could be argued that the naval rescue missions off the Somali coasts bring seafarers within the jurisdiction of the operating States, as these are conducted for the purposes of assuming control and asserting authority over the persons on hijacked vessels. Although it might be still early for this argument, this would also echo the increasing calls for interpreting the personal and spatial links in a more liberal fashion that responds to the needs of a globalised world.¹³³ It has been argued that there should be a shift from the personal and spatial link to the factual link. The latter is established between the acts of State agents and the persons whose human rights are affected by these acts and should suffice to bring the individuals within the jurisdiction of States.¹³⁴ In the same vein, seafarers, whose human rights are directly affected by rescue missions, should fall under the jurisdiction of States and they should be entitled to human rights protection.

3.3.2. *The Question of Accountability: Are the International Organisations (IOs), the States, or Both Responsible for Ensuring Human Rights Compliant Rescue Missions at Sea?*

Turning to the question of whether hostages can be protected when their human rights are affected by the naval forces acting under the mandate of an IO, such as the NATO and EU, the answers given by the current case law also pose some difficulties to the seafarers’ effective protection. The ECtHR has acknowledged that the Convention does not prevent States from acceding to IOs, but they remain bound by their Convention obligations, when

¹³² A Sari, ‘Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?’ (2015) *Military Law and the Law of War Review* 299

¹³³ H King, ‘The Extraterritorial Human Rights Obligations of States’ (2009) 9 *HRLR* 522

¹³⁴ M Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in Coomans, above n 125, 75, 80, Lawson, above n 125, 103-107, King, *ibid*, 551.

they perform their other international duties and activities.¹³⁵ However, problems arise with the cases of *A and B Behrami v France* and *R Saramati v France, Germany and Norway*, in which the Court had to examine the responsibility of States acting in Kosovo under the UN mandate. The Court concluded that the Member States could not be held accountable for human rights violations committed during the operations mandated by the UN in Kosovo based on the fact that under international law, the UN has a separate legal personality from that of its Member States.¹³⁶ This judgment, similar to the *Banković* case, has faced criticism for excessively restricting the human rights obligations of States by virtue of their membership to an IO and it has been argued that the approach of the Court ‘sends a clear message to States that they can do whatever they wish and escape any human rights scrutiny so long as they shield themselves by obtaining the imprimatur of an international organisation’.¹³⁷

The Court has shifted its approach, as it was demonstrated in the *Al-Jedda* case. In this case, the Court found that the applicant’s detention in Iraq by British forces, acting under the UN mandate, should be attributed to the UK and not the UN, as the latter did not have effective control over the acts and omissions of the UK troops.¹³⁸ In *Jaloud v Netherlands*, the Netherlands complained that it had no jurisdiction in Iraq, as its military force was assisting the UK in the security operations authorised by the UN in Iraq.¹³⁹ However, the Court found that the Dutch troops were not placed at the disposal of Iraq or the UK and they had the full command of the checkpoint, where the applicant’s son was killed, which meant that the Netherlands had established jurisdiction over the victim regardless of whether another Contracting Party might also had concurrent jurisdiction.¹⁴⁰

¹³⁵ *Bosphorus v Ireland* (2005) (Application no.45036/98) at 155-156, *M.S.S. v Belgium*, above n 60, at 338-340

¹³⁶ *A and B Behrami v France and R Saramati v France, Germany and Norway* (2007) (Application nos.71412/01 and 78166/01) at 147-152, *The Reparation case*, ICJ Reports 1949

¹³⁷ M Milanovic, & T Papic, ‘As Bad as It Gets: The European Court of Human Rights’ *Behrami and Saramati* Decision and General International Law’ (2009) 58 *I.C.L.Q.* 267-268, A Breitegger, ‘Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jedda*’ (2009) *International Community Law Review* 155-183

¹³⁸ *Al-Jedda v UK* (2011) (Application no.27021/08) at 84-86

¹³⁹ *Jaloud v Netherlands* (2014) at 112-120

¹⁴⁰ *ibid* at 151

The adoption of the Articles on the Responsibility of International Organisations (ARIO) can also contribute to holding States and IOs accountable for their wrongdoing.¹⁴¹ The ARIO will have further implications for IOs and States, since it acknowledged that dual or multiple attribution of the same conduct is possible (Article 7).¹⁴² Article 7 could be well applied to cases where the different actors are interwoven with each other, such as in the cases of NATO and EU naval forces, where the States dispose their agents to an IO. In spite of the promising nature of Article 7, which seemingly captures the complex functioning of IOs in the 21st century, it has faced lots of criticism. The ‘effective control’ that an IO is required to have over the wrongful conduct that another organ place at its disposal will be arguably hardly satisfied in practice.¹⁴³ The efficacy of the ‘effective control’ requirement is also questioned with reference to its applicability to the EU. It has been argued that ‘the approach based on “effective control” does not seem capable of capturing all the subtleties of the relationships between the EU and its Member States’.¹⁴⁴ The effective control test might put further obstacles to the human rights scrutiny of the sea operations conducted by *Operation Atalanta*, as it could be questioned whether the national naval forces fighting against piracy off the Somali coasts will ever be under the effective control of the EU.

Despite the criticism levelled at Article 7, the decision of the Dutch Supreme Court issued in the *Dutchbat* case demonstrates that States can be held responsible individually for their wrongful acts, even when they act under the mandate of an IO.¹⁴⁵ In this case, it was examined whether the Netherlands could be held responsible for the decision of the Dutch contingent (Dutchbat) to the United Nations Protection Force (UNPROFOR) to force a few individuals to leave a compound where they had sought refuge, after the Dutch forces became aware of refugees being murdered outside the compound premises. The Dutch Supreme Court argued that Articles 6-9 DARIO ‘leave open the possibility of conduct being attributed to an international organisation and a State, which would then result in dual attribution to the

¹⁴¹ Articles on the Responsibility of International Organisations (ARIO) (2011), *Yearbook of the ILC*, vol. II

¹⁴² ARIO, *ibid*, 16

¹⁴³ KM Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’ (2008) *E.J.I.L.* 518, C Tomuschat, ‘Attribution of International Responsibility: Direction and Control’ in MD Evans & P Koutrakos (eds) *The International Responsibility of the European Union* (Oxford: Hart Publishing, 2013) 5

¹⁴⁴ M Möldner, ‘Responsibility of International Organizations – Introducing the ILC’s DARIO’ (2012) *Max Planck Yrbk UN L*, 16, 324 and ARIO, above n 141, 100-101.

¹⁴⁵ *Netherlands v Muhanovic*, 6 September 2013

international organisation and the State concerned'.¹⁴⁶ Although the decisions have been considered narrow because of not touching upon the issue that 8,000 Bosnian Muslims were killed outside Dutchbat,¹⁴⁷ the hotly anticipated case of *Mothers of Srebrenica* confirms that shared responsibility between an IO and its contingent forces is not excluded.¹⁴⁸ In this case, the applicants complained that the safe haven of Srebrenica safeguarded by the Dutch battalion was overrun by the Bosnian Serb forces resulting in the deaths of between 8,000 to 10,000 individuals. The Court found that the Dutch forces had established 'factual control', as required by Article 7 of the ARIIO and thus, they 'did have *effective control* over providing humanitarian assistance to and preparation of Dutchbat's evacuation of the refugees in the *mini safe area*'.¹⁴⁹ The Court adopted a cautious approach and some limitations remain, but it is worth highlighting that the judgment opened the way to compensation for 300 deaths. The interpretation of Article 7 of ARIIO given by the Dutch Courts makes a significant contribution towards enhancing accountability for peacekeeping operations¹⁵⁰ and could also apply to the naval operations conducted by the maritime coalition forces that adversely affect the human rights of seafarers. Dual accountability of national and coalition naval forces for their wrongdoing can pave the way for a more enhanced protection in the context of rescue missions conducted for the release of seafarers off Somalia.

Overall, naval operations should be commended for their effectiveness in the fight against piracy. The conduct of patrols off the coasts of Somalia has been an invaluable tool in preventing attacks and hostage-taking in compliance with the obligations of States to prevent and put an end to the human rights suffering of seafarers. While it should not be overlooked that naval operations often take place in adverse conditions and unfriendly waters and this makes it necessary for maritime forces to retain some flexibility in their counter-piracy responses, States have also to comply with their traditional negative human rights obligations ensuring that their naval forces, whether they act individually or under the shield of an IO, operate in a human rights compliant mode and respect the human rights of seafarers during the conduct of rescue missions.

¹⁴⁶ *ibid* at 3.9.4

¹⁴⁷ C Ryngaert, 'Supreme Court (Hoge Raad), *State of the Netherlands v. Mustafić et al., State of the Netherlands v. Nuhanović*, Judgments of 6 September 2013' (2013) *N.I.L.R.* 446

¹⁴⁸ *Mothers of Srebrenica et al v State of The Netherlands and the United Nations*, 16 July 2014

¹⁴⁹ *ibid* at 4.87

¹⁵⁰ Ryngaert, above n 147, 446

4. THE WAY FORWARD: POSITIVE STEPS TOWARDS THE PROTECTION OF THE HUMAN RIGHTS OF SEAFARERS

So far, it has been explained that seafarers suffer severe human rights violations, which for the time being, States have failed to address through their counter-piracy responses. The current counter-piracy efforts reflect the lack of a human rights oriented approach that could afford protection to the victims of piracy. However, there have been two distinct regional responses to piracy which focus on the suffering of seafarers that are worthy of special review, namely, the Djibouti Code of Conduct and the Declaration condemning the violence against seafarers.

The Djibouti Code was adopted by the Djibouti meeting that brought together the most affected by Somali piracy countries under the auspices of the International Maritime Organisation (IMO). The Djibouti Code became effective in January 2009 and counts 20 signatories.¹⁵¹ The commitment of States to the effective and timely implementation of the Code is illustrated by the establishment of the Project Implementation Unit (PIU) and the Trust Fund, which was created in response to the initiative and generous offer of Japan.¹⁵² From the victims' perspective, the Djibouti Code is significant, as, *inter alia*, acknowledged the 'grave dangers' that seafarers face and accepted by consensus to commit to rescue hostages and offer proper treatment to victims of piracy.¹⁵³

To the same end aims the Declaration condemning the violence against seafarers, which was signed by the three largest flag states, the Marshall Islands, Liberia and Panama that represent between them the 40 per cent of the world's shipping tonnage.¹⁵⁴ The Commonwealth of Bahamas and St. Kitts also signed the joint declaration.¹⁵⁵ The Declaration

¹⁵¹ IMO, 'Djibouti Code of Conduct Project Implementation Unit' (2013) at

www.imo.org/OurWork/Security/PIU/Documents/PIU_Brochure_3rd_edition.pdf (accessed 11 October 2015)

¹⁵² *ibid*

¹⁵³ IMO, 'Protection of vital shipping lanes' (C 102/14) (2009) Annex 5 and Art2, Annex, Attachment 1

¹⁵⁴ ICC, 'Flag states sign Declaration condemning acts of piracy against seafarers' (2011) available at <https://icc-ccs.org/news/293-flag-states-sign-declaration-condemning-acts-of-violence-against-seafarers> (accessed 11 October 2015)

¹⁵⁵ <http://oceansbeyondpiracy.org/matrix/declaration-condemning-acts-violence-against-seafarers-washington-declaration> (accessed 11 October 2015)

recognises that the increasing violence against seafarers remains underreported.¹⁵⁶ Therefore, the signatories affirmed their commitment to the collection and dissemination of information regarding the levels of violence against seafarers.¹⁵⁷ The coordinated collation of information by four of the largest flag States aims to offer an invaluable tool to stakeholders that could use this credible data for the preparation and adoption of new strategies against piracy with a view to better protecting seafarers.

Sadly, apart from the practical difficulties that these two initiatives encounter in achieving their aims, they both remain non-binding. This means that their effectiveness relies on the willingness of States, and compliance is not compelled by enforcement mechanisms. In addition, both the documents come into play after seafarers' rights are violated. Although post incident responses should be praised, this is also indicative of the lack of focus in the human rights prevention phase, which is the most significant and most efficient stage to protect the human rights of seafarers. Despite the weaknesses, it is suggested that these regional responses offer an alternative bottom-up approach to the problem of the inadequate protection of the human rights of the victims of piracy. The more States join these efforts, the more effective the protection of the victims will become. Unlike the difficulties of a top-down approach that would require States to convene and decide on this issue, increasing human rights initiatives escorted by extended State participation could offer constructive and timely solutions to the human rights gaps in the protection of seafarers.

Before concluding, it is worth highlighting some crucial UN responses to the violations suffered by the victims of terrorist hostage-taking that could be relevant to hostages abducted by pirates. In 2011, the Advisory Committee of the Human Rights Council reported that 'acts of terrorist hostage-taking generate multiple violations of human rights of [...] victims', and further acknowledged that human rights violations can also occur during counter-terrorism activities.¹⁵⁸ Therefore, the Committee called on States to adopt responses to terrorist hostage-taking that 'respect everyone's right to life, liberty and security of person as enshrined in numerous human rights instruments and reaffirmed in the preamble to the

¹⁵⁶ 'Declaration Condemning Acts of Violence Against Seafarers' at www.safety4sea.com/images/media/pdf/The%20Washington%20Declaration.pdf (accessed 11 October 2015)

¹⁵⁷ *ibid*

¹⁵⁸ 'Report of the HRC Advisory Committee on the Human rights and issues related to terrorist hostage-taking', A/HRC/24/47 (4 July 2013) at 23

International Convention against the Taking of Hostages’.¹⁵⁹ The UN Special Rapporteur on Counter Terrorism and Human Rights went beyond the recognition of the human rights violations stressing the positive human rights obligations of States to protect hostages.¹⁶⁰ Mr. Emmerson noted with concern that as long as States seek a nexus to State responsibility for the violations of the human rights of hostages, this allows ‘victims of terrorism to remain as legally ossified “prisoners of doctrine”’ and leads to secondary victimisation.¹⁶¹

The identical suffering and legal gaps in the protection of seafarers suggest that similar responses should be adopted by the UN in the context of piracy. These two reports summarise in the most eloquent manner most of the legal defects of the contemporary human rights framework discussed above that leave the victims of piracy exposed to violations. Thus, the emerging recognition of the violations of the human rights of the victims of terrorist hostage-taking and the relevant human rights obligations of States to protect hostages can become a beacon inspiring similar responses in the context of piracy.

5. CONCLUSION

This paper has highlighted the complexities of Somali piracy and shed light on one particular aspect that remains unexplored – the violations of the human rights of seafarers. Although it was discussed that the human cost of piracy has drawn the attention of the international community, the latter has been rather reticent about acknowledging that this human cost is nothing else but breaches of the human rights of seafarers, and especially those taken hostages. The reluctance of States to draw clear links between the human cost of Somali piracy and the human rights violations of its victims may be interpreted by virtue of the non-state status of pirates. Pursuant to the traditional doctrine of State responsibility, States are not responsible for the wrongdoing of non-state agents and equally they cannot be blamed for the suffering of seafarers at the hands of pirates.

The counter-piracy responses highlight the failure of States, and international organisations, to adequately recognise the human rights violations that seafarers suffer. The UNSC Resolutions that constitute the first collective response to piracy acknowledged rather late the threats posed to seafarers and the abuses they are subjected to creating human rights

¹⁵⁹ *ibid*

¹⁶⁰ ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson’, A/HRC/20/14 (2012) at 13

¹⁶¹ *ibid*

gaps that remain unfilled. Additionally, the responses of the international community aiming to ensure the effective prosecution of those involved in pirate activities keep tripping over practical obstacles, the political unwillingness of States to get involved in this process, and more significantly the need to secure the human rights of pirates. The latter has led to the bizarre consequence of safeguarding the human rights of pirates, but losing sight of the right of their victims. Finally, the indispensable naval operations also suffer human rights flaws, as the lack of human rights precautions during the conduct of rescue missions has proved to be fatal for seafarers.

Nonetheless, the human rights of seafarers can, and should, be protected. It is suggested that the development of the positive obligations that States have to prevent and put an end to violations, when they know or ought to have known that individuals are at risk, are applicable to seafarers. It is argued that it is now well-established that seafarers traversing the HRA are at risk and thus, States should protect them. Moreover, it was suggested that States engaging in counter-piracy operations should respect their negative human rights obligations regardless of the extra-territorial or allied character of these operations. These arguments can be upheld by the emerging recognition of the human rights violations suffered by the hostages and the pertinent human rights obligations of States in the context of terrorist hostage-taking. The work of the UN bodies towards an enhanced human rights framework effectively protecting the victims of terrorist hostage-taking could apply *mutatis mutandis* to the victims of pirate hostage-taking. These responses along with an improved bottom-up approach reinforced by regional counter-piracy responses to the suffering of seafarers can pave the way for the protection of the human rights of seafarers.

(9,818 words – 13,226 including footnotes)